(3)

Supreme Court, U.S.
FILED
APR 19 2002
OFFICE OF THE CLERK

01 1299

No.

In the

Supreme Court of the United States

GREGORY C. WATTS,

Petitioner,

v.

THE CITY OF NORMAN, a political subdivision of the State of Oklahoma,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

Kenneth Ray Feagins, Esquire
Attorney at Law
Counsel of Record
STANLEY M. WARD
LAW OFFICES
Stanley M. Ward, Esquire
Woodrow K. Glass, Esquire
Attorneys at Law
629 24th Avenue, S.W.
Norman, Oklahoma 73069
(405) 360-9700
Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

12 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. THERE ARE CONFLICTS AMONG THE CIRCUITS AT THE PRIMA FACIE AND PRETEXT STAGES 4

B. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE 5

C. WATTS HAS STANDING 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

ANDERSON V. LIBERTY LOBBY, INC., 477 U.S. 242 (1986) 6

MCDONALD V. SANTA FE TRAIL TRANSP. CO., 427 U.S. 273 (1976).....5, 7

MCDONNELL DOUGLAS CORP. V. GREEN, 411 U.S. 792 (1973)..... PASSIM

PATTERSON V. AVERY DENNISON CORP., 281 F.3D 676 (7TH CIR. 2002).....5

PATTERSON V. MCLEAN CREDIT UNION, 491 U.S. 164 (1989).....4

REEVES V. SANDERSON PLUMBING PRODUCTS, INC., 120 S. CT. 2097 (2000) 2, 3, 6

ST. MARY'S HONOR CENTER V. HICKS, 509 U.S. 502 (1993).....3, 4

SWIERKIEWICZ V. SOREMA N.A., 534 U.S. ____ (2002) 2, 5, 6

TEXAS DEP'T OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981).....2, 3, 5

U.S. POSTAL SERV. BD. OF GOVERNORS V. AIKENS, 460 U.S. 711 (1983).....2, 3

STATUTES

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. 2000(e) *et seq.*.....1, 3, 4, 6, 7

RULES

FED. R. CIV. P. 8 ..... 6, 7

FED. R. CIV. P. 9 6

FED. R. CIV. P. 12(b)(6) 6

FED. R. CIV. P. 50 ..... 6, 7

FED. R. CIV. P. 56 ..... 2, 6, 7

This case is not about semantics as respondent contends in its brief in opposition. Br. in Opp. 12. It is about ridding the workplace of the wretched vestiges of racial discrimination that continue to plague this Nation. Pet. 7-10. It is about providing a civil rights plaintiff with a "full and fair opportunity" to demonstrate unlawful discrimination in an employment discrimination case based on circumstantial evidence and governed by the *McDonnell Douglas* burden-shifting framework.

In most employment discrimination cases, there is no direct evidence of unlawful discrimination–no "smoking gun." Because a guilty employer usually attempts to mask its unlawful discrimination by proffering a legitimate, nondiscriminatory reason for the alleged discriminatory action, a plaintiff is forced to use a similarly situated comparable to demonstrate unlawful discrimination. Pet. 6-7; Br. in Opp. 12.

In *Watts*, the United States Court of Appeals for the Tenth Circuit summarily closed the door on a plaintiff's ability to demonstrate unlawful discrimination by ruling that a *supervisor* may *never* be compared to a *subordinate* as a "*similarly situated*" comparable in a Title VII discriminatory discipline case governed by the *McDonnell Douglas* burden-shifting analysis. The comparison is not legally relevant. Pet. App. 9a. Respondent disputes that there is a conflict among the Circuits by arguing that "*the alleged conflict exists in semantics only.*" Br. in Opp. 12. (emphasis added).

Because the Tenth Circuit's inflexible rule that supervisors and subordinates are never similarly situated for the purpose of demonstrating unlawful discrimination was imposed at the pretext stage of analysis, it impermissibly frustrated this Court's mandate, first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973), that a plaintiff must be given a **full and fair opportunity** to demonstrate by competent evidence that the employer's proffered nondiscriminatory reasons for the alleged discrimination are a pretext for discrimination. Pet. 7-10, 15 n.4.

This case presents important evidentiary questions regarding comparables, circumstantial proof of unlawful discrimination, and the proper role of a court within the application of Rule 56 of the Federal Rules of Civil Procedure to employment discrimination claims governed by the *McDonnell Douglas* analytical framework. This case was decided on summary judgment because the courts below determined that petitioner did not meet his evidentiary burden regarding pretext. Pet. App. 15a-16a, 28a-29a.

Respondent does not dispute that this Title VII case is governed by the *McDonnell Douglas* burden-shifting analysis.[1] Under this approach, first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792(1973), and recently reiterated in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097, 2106 (2000), the Court established the basic allocation of burdens and order of presentation of *proof* in employment discrimination cases based on circumstantial evidence.

First, the plaintiff must establish a prima facie case of discrimination. *Id.* This burden is not onerous. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The plaintiff's relatively light initial burden at this stage of analysis stems from the Court's recognition that acts of discrimination will most often be hidden and subtle. Seldom will there be direct evidence or "eyewitness testimony as to the employer's mental processes." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

After a plaintiff establishes a prima facie case of discrimination,[2] the burden of production, not persuasion, shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the alleged discriminatory action. *Reeves*, 120 S. Ct. at 2106. "[I]t can involve no

---

[1] This Court recently observed in *Swierkiewicz v. Sorema N.A.*, 534 U.S. ___, *4 (2002): "In *McDonnell Douglas*, this Court made clear that 'the critical issue before us concern[ed] the order and allocation of *proof* in a private, non-class action challenging employment discrimination."

[2] The elements of the prima facie case are not rigid and may vary from case to case according to the particular facts. *McDonnell Douglas*, 411 U.S. at 802 n. 13.

credibility assessment." *Id.* (*quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993)). Once the employer meets its burden of production, the *McDonnell Douglas* framework and the presumption of discrimination established as a result of the prima facie case simply "drops out of the picture." *Id.* The only issue remaining is "discrimination *vel non*." *Id.* (*quoting Aikens*, 460 U.S. at 714). Moreover, "[a]lthough intermediate evidentiary burdens shift back and forth under this framework, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* (*quoting Burdine*, 450 U.S. at 253).

However, as this Court observed in *Reeves* and the petitioner alluded to in his petition (at 9-10, 15 n.4):

> "the plaintiff—once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision—must be afforded the "[full and fair] opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."" *Id.*

The respondent does not dispute that petitioner established a prima facie case. Br. in Opp. 22. The sole issue on appeal was whether the City's different treatment and discipline of Watts and Wilson in response to a single fighting incident, in which Watts and Wilson were the only two persons involved, is evidence of pretext—"in other words, evidence that a discriminatory reason more likely motivated the City or that the reason the City gave for its treatment of Watts was unworthy of belief". Pet. 4-5; Pet. App. 9a.

One of the established methods of demonstrating pretext in a discriminatory discipline case is showing that the employer treated the plaintiff "differently from similarly-situated employees who violated work rules of comparable

seriousness." Pet. App. 9a. The Court has consistently made clear that an employment discrimination plaintiff attempting to demonstrate unlawful discrimination "is not limited to presenting evidence of a certain type," because proof of pretext "may take a variety of forms." *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989). "Especially relevant to such a showing" is evidence that the rule or criterion relied on by the employer to explain its decision was applied in a discriminatory manner. Pet. 8-9. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

In this case, the Tenth Circuit imposed a rigid rule that prohibited petitioner from attempting to meet his evidentiary burden of demonstrating pretext in response to a motion for summary judgment by comparing the respondent's different treatment and discipline of his subordinate. In response to a single incident of fighting in violation of respondent's work place rule against fighting, even though the two men, one black, the other white, were the only two persons involved, the employer disciplined only Watts, the black supervisor. Br. in Opp. 8, Pet. App. 12a-13a. Genuine issues of material fact regarding pretext exist because this rigid and mechanized rule impermissibly frustrated petitioner's full and fair opportunity to demonstrate pretext. Watts should be allowed to present his claims to a jury.

A. THERE ARE CONFLICTS AMONG THE CIRCUITS AT THE PRIMA FACIE AND PRETEXT STAGES.

Petitioner is aware of no Circuit (other than the Tenth Circuit) that prohibits the comparison as a matter of law of a supervisor to a subordinate in a Title VII discriminatory discipline case based on circumstantial evidence at the both

the prima facie and pretext stages of analysis. In its brief in opposition, respondent does not cite any contrary authority.

Respondent attempts to minimize the conflicts among the circuits by focusing on the prima facie and pretext aspects of the *McDonnell Douglas* analysis. For example, respondent contends that the Tenth Circuit's decision in *Watts* does not conflict with the Second, Sixth, and Eleventh Circuits because the decisions cited in the petition addressed the similarly situated analysis at the prima facie stage. Br. in Opp. 14, 16-17, 20. However, as explained in the petition, in the Tenth Circuit a supervisor and a subordinate are never similarly situated in the pretext stage and the similarly situated element is no longer an element of a prima facie case. Pet. 15-16. On the other hand, the "similarly situated" element is a part of the prima facie case in the Second, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits. Pet. 13; Br. in Opp. 14, 16-17, 20. *Patterson v. Avery Dennison Corp.*, 281 F.3d 676 (7th Cir. 2002).

B. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE.

As petitioner observes in his petition, this Court formulated the pretext stage of the *McDonnell Douglas* methodology to ensure that a plaintiff has a "*full and fair opportunity*" to show that the employer's proffered nondiscriminatory reason for the alleged discrimination is in fact a pretext for unlawful discrimination. Pet. 9-10, 15-16 n.4. Respondent does not dispute that the "similarly situated" comparable method of demonstrating pretext at issue in this case has its genesis in "*McDonnell Douglas, McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)." Br. in Opp.12.

As petitioner observed in his petition, the *McDonnell Douglas* methodology issues raised in this case are somewhat analogous, albeit under different federal rules of civil procedure, to those recently addressed by this Court in *Swierkiewicz v. Sorema N.A.*, 534 U.S. ____ (2002). Pet. 12

n.3. Unlike the *pleading* issues presented in *Sorema* under Rules 8(a), 9, and 12(b)(6) of the Federal Rules of Civil Procedure, this case presents important *evidentiary burdens* of *proof* issues within the *McDonnell Douglas* framework under Rules 50[3] and 56 of the Federal Rules of Civil Procedure.

In his a*micus curiae* brief in support of the petitioner in *Sorema*,, the Solicitor General observed on behalf of the United States and the Equal Employment Opportunity Commission:

> "This case presents an important question concerning the application of Federal Rule of Civil Procedure 8, which outlines the required content of a complaint, to employment discrimination claims arising under Title VII of the Civil Rights Act of 1964 . . . The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII against public and private employers . . . The Court's decision in this case is likely to affect the enforcement responsibilities of the EEOC and the Attorney General. Furthermore, Title VII . . . appl[ies] to the federal government in its capacity as the nation's largest employer." (citations omitted).

Supreme Court Case No. 00-1853, Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* Supporting Petitioner 1-2.

As in *Sorema*, this case presents important questions concerning the application of the Federal Rules of Civil

---

[3] Although this case was decided on *summary judgment* at the pretext stage of analysis under Rule 56 of the Federal Rules of Civil Procedure, this Court has observed that "[t]he standard for judgment as a matter of law under Rule 50 mirrors the standard for summary judgment under Rule 56." *Reeves*, 120 S. Ct. at 2102. The "inquiry under each is the same." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

Procedure to employment discrimination claims arising under Title VII of the Civil Rights Act of 1964, albeit Rules 50 and 56 rather than Rule 8. As in *Sorema*, the Attorney General and the EEOC share in responsibility for enforcing Title VII, as well as other federal employment discrimination statutes. As in *Sorema*, the Court's decision in this case is likely to affect the enforcement responsibilities of the EEOC and Attorney General. As in *Sorema*, this case concerns the appropriate role of the judge in pretrial stages of litigation. Finally, as in *Sorema*, Title VII applies to the federal government in its capacity as the nation's largest employer.

The Court's recent reiterations of the full and fair opportunity doctrine in *Reeves* and *Hicks*, coupled with a close reading of the Court's underlying reasoning and logic contained in the genesis of the similarly situated analysis in Title VII disparate treatment cases based on circumstantial evidence, first articulated in *McDonnell Douglas* and *McDonald v. Santa Fe Trail Transp. Co.*, clearly support this Court's review of the *Watts* decision.

C. WATTS HAS STANDING

Respondent's assertion on page 22 of its brief that Watts lacks standing to raise the similarly situated issue regarding the prima facie case is unpersuasive in light of its contention on page 10 that "contrary to the assertion in Watts' petition, the Tenth Circuit did not affirm the district court's determination that Mr. Watts had established his *prima facie* case which included the element of 'similarly situated.'" Br. in Opp. 10.

CONCLUSION

For the reasons stated above, and in the petition for a writ of certiorari, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

Kenneth Ray Feagins, Esquire
Attorney at Law
Counsel of Record
STANLEY M. WARD LAW OFFICES
Stanley M. Ward, Esquire
Woodrow K. Glass, Esquire
Attorneys at Law
629 24th Avenue, S.W.
Norman, Oklahoma 73069
(405) 360-9700
Attorneys for Petitioner